BRIEF FOR PLAINTIFF IN ERROR

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Supreme Court of the United States.

OCTOBER TERM, 1899.

THE JAMESTOWN & NORTHERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
THEODORE J. JONES.
No. 142.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case comes here upon writ of error to the Supreme Court of the State of North Dakota. The question is one of title to land, the plaintiff in error claiming the locus to be part of its right of way under the act of Congress of March 3, 1875 (18 Statutes, 482), and the defendant in error claiming under patent from the United States, based on a pre-emption settlement initiated March 3, 1883, commuted to homestead entry November 21, 1892, patented May 26, 1893.

The suit was instituted in the State Court by the railway company. The complaint sets up compliance with the said act of congress of 1875, and acquisition by

virtue thereof of a right of way alleged to be prior and paramount to the defendant's title. The bill prays that plaintiff's title be established by decree, and that it have an injunction, &c. It shows a right and title based on and derived directly under the act of Congress; therefore it asserts distinctly a *Federal* right and raises a Federal question. (Transcript, pp. 9–11.) The decree below was *final*, adjudging title to be in the defendant in error and dismissing the bill. (Transcript, pp. 27, 28.) This decree was affirmed in the Supreme Court of the State. (Transcript, pp. 41, 42.) A Federal right and question was not only distinctly asserted in the bill as the only foundation of the suit, but it was distinctly denied by the judgment of the State Court, and was the *only* point decided or on which the case could have been disposed of. (Transcript, pp. 33–41.) The jurisdiction of this Court is therefore clear.

The material facts shown in the findings of the State Court are as follows:

The Railway Company was incorporated under the laws of North Dakota September 17, 1881. It commenced a survey of its line on September 1, 1881, and completed the same October 30, 1881. Its course passed over the land in question. (Transcript, p. 22.) A map representing the survey was made, and the map and survey adopted by the board of directors as the company's line October 5, 1882. During the year 1882 the line was graded and constructed, and ever since the summer of 1882 the company has continuously operated the same as a railway over the land in question. (Transcript, p. 22.)

On January 26, 1883, the company filed with the Department of the Interior a copy of its article of incorporation, certified by the Secretary of Dakota Territory, a certificate of its organization made by its Secretary, and an

affidavit of its President, designating the officers of the corporation. (Transcript, p. 22.) This complied with Sec. 1 of the said act of 1875.

Next, as to the filing of a map under Sec. 4 of said act. This land is in the Fargo land district. On June 7, 1893, the records of the United States Land Office at Fargo were destroyed by fire, so that at the time of the trial there were no original records in said office. (Transcript, p. 22.) There was in that office what purported to be a *copy* of the original tract book, which was furnished to that office by the *General Land Office*, and was made up from the records there kept. Such tract book showed the railway line. (Transcript, pp. 22, 23.) In the operation of the Land Office all original documents filed in a local office are regularly forwarded to the General Land Office, where the same are kept as original records. (Transcript, p. 23.) It was shown on the trial that a profile or map of the line was filed in the *General Land Office* on March 13, 1883, and was approved that day by Secretary Teller. (Transcript, pp. 23, 24.)

The records of the local office having been burned and the Secretary being presumed to have acted according to law, it must be presumed that this map was filed in the *local land office* prior to March 13, 1883, and properly filed in the Interior Department *on* that day, and so it will appear that the State Court treated the case.

The foregoing made the plaintiff in error's title. The defendant's title is as follows: On February 12, 1881, May 26, 1882, and March 7, 1883, there were claims filed against this quarter section, under the pre-emption or homestead laws, by three different persons, and these claims were uncancelled of record when our map was filed, March 13, 1883. *But the defendant in error does not claim under either of these entries, which were all subsequently cancelled.*

Defendant in error filed declaratory statement under the pre-emption law, June 5, 1883, alleging settlement on the land on March 3, 1883. His application to purchase was refused owing to the prior homestead entry of March 7, 1883. But in November, 1892, this prior entry was relinquished, and on the 21st of that month Jones changed his entry to a homestead. This entry was allowed and final proof made in January, 1893. Patent issued to him May 26, 1893.

To sum up the facts briefly, it appears that Jones settled on the land *after* the railway was built and in actual operation over it and after the company had filed with the Secretary its proof of incorporation, complying with Sec. 1 of the said act of 1875. But the company's *map* was filed and approved by the Secretary *after* he had settled but before he filed his pre-emption declaratory statement.

Assignments of Errors.

Errors are properly assigned in the record. (Transcript, pp. 43–46.) The errors and points we rely upon may be thus stated:

1. Prior entries or filings do not defeat the right-of-way grant unless they ripen into title. On their cancelation or relinquishment the right of way attaches. This proposition the State Court held in our favor.

2. The company acquired a lawful right of way by its actual location and construction, coupled with the filing of its articles with the Secretary, prior to the defendant in error's settlement and the inception of his right.

3. The entry of defendant in error having been initiated after the road was constructed, he acquired the land subject to the easement.

Argument.

I.

The Supreme Court of North Dakota undoubtedly declared the law correctly when it held that the rights of the railway company were not affected by the pre-emption and homestead claims appearing of record against the land when the road was constructed but which were abandoned and never ripened into title. The act of 1875 confers upon railroad corporations a right of way over the lands of the United States, but instead of excepting from the grant, as in grants of land to aid in construction, all lands to which claims or rights have attached, provides for the condemnation of such rights and the payment to the occupant of the value of his interest. Upon compliance with the terms of the act the company succeeds to the rights of the United States subject to the obligation to condemn and make compensation, as their interest may appear, where individuals have obtained rights under the public land laws.

As is well suggested by the Court below, if it should be held that the company could be compelled to condemn rights other than those actually existing at the date of the attachment of the grant, there would be nothing to prevent new rights being asserted after each condemnation was completed, and such successive claims would render it impossible to perfect a title as contemplated by the act.

In the case of land grants in aid of construction all lands subject to claims are excepted, but a right of indemnity selection is conferred. Under the act of 1875 no right of indemnity could compensate for lands excepted,

for a railroad must be continuous, and for this reason by the terms of the act the company succeeds to the rights of the United States, bound, however, to make compensation to any person who has existing rights. And on this proposition the Interior Department is in accord with the Court below. Montana Central R.R. Co., 25 Land Decisions, 250.

The adoption of any other construction would defeat the object of the act. If an abandoned filing or entry should be held sufficient to defeat the grant, and there was no possessory right to be condemned, it is plain that no title to a right of way could ever be obtained. No title could be acquired from the Government by purchase nor could the right of the Government be condemned and the anomaly would be presented of a railroad lawfully constructed and operated at all points between its termni except over a single intervening quarter section of public land across which no right of way could be secured.

II.

The railroad of the plaintiff in error was constructed over the premises in controversy in the year 1882, being completed in the summer of that year, and has since been operated. A copy of the articles of incorporation of the company and proof of its organization in 1881 were filed with the Secretary of the Interior on January 26, 1883.

Under the plain construction of the act, it is submitted that the title to the right of way thereupon vested in the company.

Section one of the act of March 3, 1875, is as follows:

"SECTION 1. The right of way through the public lands "of the United States is hereby granted to any railroad

" company, duly organized, under the laws of any State " or Territory, except the District of Columbia, or by the " Congress of the United States, which shall have filed " with the Secretary of the Interior a copy of its articles " of incorporation, and due proofs of its organization " under the same, to the extent of one hundred feet on " each side of the central line of said road; also the right " to take from the public lands adjacent to the line of said " road, material, earth, stone, and timber necessary for the " construction of said railroad; also ground adjacent to " such right of way for station buildings, depots, machine " shops, side tracks, turnouts, and water stations, not to " exceed in amount twenty acres for each station, to the " extent of one station for each ten miles of its road."

Argument can add nothing to a statement of the terms of the statute which provides that a right of way is granted to the company complying with the terms of the act of " one hundred feet on each side of the central line of said " *road*."

It is true that section four of the act contemplates the filing of a map in the district land office, not, however, as a condition precedent to enjoying the grant conferred by section one, but for the purpose of securing a location made in advance of construction. The Court below fell into the error of holding that the act which vested the grant and defined the limits of the right of way conferred by section one was the filing of the map mentioned in section four. This section is as follows:

" SEC. 4. That any railroad company desiring to secure " the benefits of this act, shall, within twelve months " after the location of any section of twenty miles of its " road, if the same be upon surveyed lands, and, if upon " unsurveyed lands, within twelve months after the sur- " vey thereof by the United States, file with the register " of the land office for the district where such land is

" located a profile of its road; and upon approval thereof " by the Secretary of the Interior the same shall be noted " upon the plats in said office; and thereafter all such " lands over which such right of way shall pass shall be " disposed of subject to such right of way: *Provided*, " That if any section of said road shall not be completed " within five years after the location of said section, the " rights herein granted shall be forfeited as to any such " uncompleted section of said road."

This conclusion of the Court below is in direct conflict with the decision of this Court in Washington and Idaho Rd. Co. *v.* Coeur d'Alene Ry. Co., 160 U. S. 77, and it is submitted that that decision is decisive of this case.

In that case it appeared that the Couer d'Alene Company was a corporation organized under the laws of Montana and on July 20, 1886, filed in the office of the Secretary of the Interior a certified copy of its articles of incorporation and proofs of its organization. In the summer of 1886 the company surveyed three lines for the route of a proposed railroad along the south fork of the Coeur d'Alene River, called lines "A," "B," and "C;" the lines "A" and "B" both being on the south side of the river, and the line "C" being on the north side of the river. On November 9, 1886, the company filed a map in the proper district land office showing the location of its railroad over and along line "B" on the south side of the river and this map was, on December 3, 1886, approved by the Secretary of the Interior. In the summer and fall of 1887 the company constructed its road on line "C," on the north side of the river. The company never filed a map of its line on the north side of the river.

The action was brought by the Washington and Idaho Company claiming title by virtue of a survey and location

on the ground under the act of March 3, 1875, subsequent, however, to that of the defendant company, and the complaint prayed the recovery of the right of way occupied by the Coeur d'Alene Company.

The opinion, after stating simply that the Coeur d'Alene Company had filed a copy of its articles of incorporation and proof of its organization, and had constructed its road, continues:

"If these facts stood unaffected by other evidence, the "title of the Coeur d'Alene Railway and Navigation Com- "pany to the land in controversy would be clear."

The Court then proceeds to consider the contention of the plaintiff that because the defendant had filed a map on line "B" on the south side of the river its rights were fixed and it could not adopt another route. But the Court say:

"We agree with the Circuit Court of Appeals in think- "ing that, so far as the United States are concerned, there "is nothing in the act forbidding a railroad company, hav- "ing adopted one line of survey along the route provided "for in its articles, and having filed a plat thereof, to sub- "sequently, and within the time allowed it by law for so "doing, adopt another route, and that no reason is ap- "parent why, instead of filing a second plat, it may not "construct the road on the line surveyed and adopted, so "long as the rights of others have not intervened."

In other words, the Court holds that location and construction are as effective as the filing of a map to define the limits of the right of way and to vest a title under the act of Congress.

Probably the true construction of section four is, as before suggested, to secure a right of way merely upon location and in advance of construction. This view is

supported by the provision that any railroad company to *secure* the benefits of the act is required to file a map or profile of its road within twelve months after the location of its road over surveyed land, and within twelve months after survey where the road is located over unsurveyed land, to which is coupled the proviso that if any section of the road is not constructed within five years after location the rights granted shall be forfeited.

In any view of the construction of section four it seems plain that the right of way vests presently on location or at least *when* the map is filed the title relates back to the construction. There can be no doubt that a railroad company obtains a right of way over unsurveyed lands under the act although it is impossible to file a map until after survey. And where the location and construction are over surveyed lands, if the law is complied with, as in the case at bar, by filing the map within twelve months of such location, no reason is apparent why the title to the right of way is not as perfect as in the case of a compliance with the law where the location and construction are over unsurveyed lands.

In the case at bar the location and construction took place during the summer of 1882, and the map was filed on March 13, 1883.

Both before and after the decision of this Court in Washington & Idaho Rd. Co. *v.* Cœur d'Alene Ry. Co., *supra*, it was held by the Interior Department that the rights of a railroad corporation under the act of 1875 accrued from the date of construction and not merely from the filing of a map. Dakota Central Rd. Co. *v.* Downey, 8 Land Decisions, 115 (Secretary Vilas); St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Maloney, 24 Land Decisions, 460; Montana Central Rd. Co., 25 Land Decisions, 250; St. Paul, Minneapolis & Manitoba Ry. Co., 26 Land Decisions, 83 (Secretary Bliss).

The first of these decisions, that of Dakota Central Rd. Co. *v.* Downey by Secretary Vilas was made in 1889, and the construction of the Interior Department has been uniform since that time and still obtains, as shown by the case of St. Paul, Minneapolis & Manitoba Ry. Co., *supra*, decided in 1898. The settled construction of the executive branch of the Government, as has been said by this Court many times, is entitled to great weight, and the reasoning of the Supreme Court of North Dakota furnishes no sufficient ground for overturning a construction which has been established for ten years.

This Court has had occasion to consider the act of 1875 in Washington & Idaho Rd. Co. *v.* Osborn, 160 U. S. 103, and in Spokane Falls & Northern Ry. Co. *v.* Zigler, 167 U. S. 65.

III.

Finally it appears that when the defendant Jones initiated his rights to the land in controversy by his settlement of March 3, 1883, the railroad of the plaintiff had been constructed and was in operation. It is clear that the company was no trepasser but that it was entitled under the act of 1875 to build and operate its road across the public lands. If the land in controversy had been that of a private person and the road had been constructed with the consent or acquiescence of such owner, it is clear that thereafter such owner could not have maintained an action of ejectment or for trespass.

And in Northern Pacific Rd. Co. *v.* Smith, 171 U. S. 270, this Court applied this rule where a railroad was constructed over the public lands. The Northern Pacific Company having a grant of right of way under the act of July 2, 1864, filed a map of definite location but did not construct its road on the line shown on this map. Smith

brought ejectment to recover a portion of the right of way occupied by the company, claiming title under a town-site entry made on behalf of the city of Bismarck. The town-site entry, however, was not made until after the railroad had been constructed.

The Court said:

"And be it further conceded, but not decided, that the "railroad company when it changed its route, after the "filing of its map of definite location, lost its priority of "right under the act of 1864, as against the subsequent "grantees of the United States who obtained title before "the actual construction of the railroad, and that the "railroad company could only legally proceed under the "exercise of its right of eminent domain, it still remains, "as we think, under the facts of this case, that Smith "could not maintain his present action seeking to oust "the company from possession of its right of way and "railroad constructed thereon.

"There is abundant authority for the proposition that, "while no man can be deprived of his property, even in the "exercise of the right of eminent domain, unless he is com-"pensated therefor, yet that the property holder, if cogni-"zant of the facts, may, by permitting a railroad company, "without objection, to take possession of land, construct its "track, and operate its road, preclude himself from a remedy "by an action of ejectment. His remedy must be sought "either in a suit in equity or in a proceeding under the "statute, if one be provided, regulating the appropriating "of property for railroad purposes."

After reviewing the authorities, the Court concludes:

"Upon principle and authority we therefore conclude "that neither the city of Bismarck, as owners of the town "site, nor its grantee, Smith, can, under the facts and cir-"cumstances shown in this record, disturb the possession "of the Northern Pacific Railroad Company in its right "of way extending two hundred feet on each side of its "said road."

It is plain that in the case at bar Jones acquired the land subject to the burden of the easement created by the construction of the road. It is not the practice of the land department to insert an exception or reservation of rights of way when issuing patents, and no presumption arises because of the patent to Jones that the United States intended to convey the right of possession to the strip occupied by plaintiff's railroad.

Jones having purchased the land after the road was constructed, he secures no right to interfere with its operation whether the entry of the company be lawful or unlawful.

This Court said in Roberts *v.* Northern Pacific Railroad Company, 158 U. S. 1, 10:

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right of payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

It is not perceived why a different rule should apply in this case, where Jones acquired the land by a proceeding initiated under the public land laws after the road was constructed.

As held in the Smith case, a patent for land upon which a railroad has been constructed without the benefit of a grant conveys the land subject to the easement and does not confer the right to disturb the possession of the railroad company. If, then, a railroad has been constructed

over the public lands without authority of law, and right to compensation exists in favor of the United States, this right would no more pass by the issuance of a patent than would the same right pass by the deed of a private person.

The rights of the United States arising from its ownership as a body politic of the public lands are neither more nor less than those of an individual in his private property. The United States may sue in ejectment to recover possession of its lands, and it may sue in trespass for an injury done to them. "As an owner of property in almost " every State of the Union, they (the United States) have " the same right to have it protected by the local laws " that other persons have." (Cotton *v.* U. S., 11 Howard, 229.)

But it is important to observe that the entry of the plaintiff company was lawful. Whatever may be the effect of the filing of the map mentioned in section four on the ultimate acquisition of title, it is clear that the act contemplates an entry upon the land before the filing of a map, for twelve months are allowed within which to file the map where the road is located on surveyed land and twelve months after survey where the road is located on unsurveyed land.

It is submitted that the judgment should be reversed.

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